

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 16.11.2016

Dated : 02.12.2016

CORAM

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

S.A.No.1168 of 2014

1. S.A.Zahir Hussain

2. M.Gunasekar Appellants/Defendant

- Vs -

T.Somasundaram ... Respondent /Plaintiff

Prayer : Second Appeal is filed under Section 100 C.P.C. against the judgment and decree, dated 12.09.2014 and made in A.S.No.28 of 2014 on the file of the learned IV Additional Judge, City Civil Court, Chennai confirming the judgment and decree dated 04.06.2013 and made in O.S.No.629 of 2008 on the file of VI Assistant Judge, City Civil Court, Chennai.

For Appellants : Mrs.Nalini Chidambaram
For M/s.Uma

For Respondent : Mr.P.L.Narayanan

J U D G M E N T

This memorandum of Second Appeal is directed against the judgment and decree dated 12.09.2014 and made in the appeal in A.S.No.28 of 2014 on the file of the IV Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 04.06.2013 and made in the suit in O.S.No.629 of 2008 on the file of the VI Assistant Judge, City Civil Court, Chennai.

2. The appellants herein are the defendants in the suit in O.S.No.629 of 2008 whereas the respondent is the plaintiff.

3. For easy reference and also for the sake of convenience, the appellants may herein after be referred to as the defendants and the respondents be referred as the plaintiffs wherever the context so require.

4. The plaintiff had filed a suit in O.S.No.629 of 2008 on the file of the VI Assistant Judge, City Civil Court, Chennai as

against the defendants and thereby sought the relief of specific performance of contract of sale directing the defendants to execute and register a sale deed in his favour in respect of the properties morefully described in the plaint schedule and also for the relief of permanent injunction restraining the defendants from alienating, encumbering, transferring or in any manner deal with the suit property and also for the consequential relief of permanent injunction restraining the defendants from in any manner interfering with his peaceful possession, occupation and enjoyment of the suit property. This suit was resisted by the appellants.

5. On appreciation of evidence both oral and documentary, the learned trial judge had decreed the suit with costs declaring that the plaintiff is entitled for the relief of specific performance of contract of sale, directing the defendants 1 and 2 to receive the deposited amount towards the balance of sale consideration and to execute the sale deed in favour of the plaintiff within a period of three months, failing which, the plaintiff is entitled to get the sale deed executed through the process of Court. The Trial Court had also found that the plaintiff is also entitled for the possession of the suit property from the second defendant.

6. Being aggrieved by the judgment and decree of the suit dated 04.06.2013, the appellants/defendants had preferred an appeal in A.S.No.28 of 2014 on the file of the VI Assistant Judge, City Civil Court, Chennai in A.S.No.28 of 2014. This appeal was dismissed on 12.09.2014 confirming the judgment and decree of the trial court. The defendants have therefore stand before this Court with this second appeal.

7. Heard Mrs.Nalini Chidambaram, learned counsel for M/s.Uma for the appellants/defendants and Mr.P.L.Narayanan, learned counsel for the respondent/plaintiff.

8. This second appeal came to be admitted on the following four substantial questions of law:-

1. Whether the courts below are right in holding that as per Exhibit A-2 the Respondent is entitled to get the relief of Specific Performance when the Respondent has not complied with the requirement of Section 2(b) and (e) of the Indian Contract Act, 1872 ?

2. Whether the Courts below are right in holding that the veracity of Exhibit B-3 to be proved by the 1st Appellant when the Respondent disputed his signature in Exhibit B-3 ?

3. Whether the Courts below are right in decreeing the suit and directing the Appellants to

deliver the vacant possession of the suit schedule property to the Respondent in the absence of a suit prayer by the Respondent seeking for possession of the suit schedule property in terms of Sections 5 and 6 of Specific Relief Act ?

4. Whether the suit is barred by limitation ?

9. Before we go into the merits of the case, this Court would like to place it on record that the present suit for specific performance of contract of sale was decreed by the trial court as prayed for by the plaintiff. The appeal preferred by the defendants was dismissed after confirming the judgment and decree of the trial court. It is therefore apparent that both the Courts have given concurrent findings. Based on this fact, the following crucial question is arisen for the consideration of this Court:

"Whether the appellate jurisdiction of this Court can be exercised to interfere with the concurrent findings of the Courts below ?"

10. As per the provisions of Sub-Section 4 of Section 100 of the Code of Civil Procedure (in short, it will herein after be referred to as the code) the High Court shall formulate the question if it is satisfied that a substantial question of law is involved and thereafter as provided under Sub-Section 5 of Section 100 of the Code, the appeal shall be heard on the question so formulated and the respondent shall, be allowed to argue at the hearing of appeal, that the case does not involve such question.

11. The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the Courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the Courts have wrongly cast the burden of proof.

12. Normally, High Court in second appeal cannot re-appreciate the evidence and interfere with the concurrent findings. Further merely because two views were possible different view cannot be adopted. This Court may note here that solely because another view is possible on the basis of the evidence, this Court would not be entitled to exercise the jurisdiction under Section 100 of the Code.

13. The case of plaintiff is:

That he entered into a sale agreement dated 03.08.2002 with the 1st defendant/R2 to purchase the property situate at No.26, (New No.38), Mujabar Jang Bahadur Street, Triplicane, Chennai-

600 005, measuring about 800 sq.ft. Since he had not come forward to enforce the said sale agreement, the plaintiff was constraint to file the above suit for the relief of specific performance of contract of sale directing the 1st defendant to execute and register the sale deed in respect of the suit property for a total sale consideration of Rs.9,00,000/- within the date which may be fixed by the Court, failing which, the Court may execute and register such sale deed in his favour on behalf of the 1st defendant and he had also sought the relief of permanent injunction to restrain the 1st defendant from alienating the suit property and not to interfere with his peaceful possession and enjoyment of the suit property.

14. The plaintiff has contended that originally he had been in possession of the suit property as a lessee from the year 1982, on payment of one time lease rental of Rs.50,000/- on the understanding that as and when the plaintiff vacates the property, the said amount would be returned to him without interest.

15. In the year 2002, the 1st defendant had approached him (plaintiff) with an offer to sell the suit property to him for a total sale consideration of Rs.9,00,000/- which was accepted by the plaintiff and accordingly on 03.08.2002 a sum of Rs.2,00,000/- was paid by cash towards advance of sale consideration and the remaining balance was agreed to be paid as and when the 1st defendant execute the sale deed in favour of the plaintiff. Confirming the said agreement, a receipt cum agreement of sale was executed on 03.08.2002 between him and the 1st defendant. The agreement between them, is that the interest free refundable lease rental could be adjusted from the sale consideration at the time of execution and registration of sale deed in favour of the plaintiff.

16. According to the plaintiff, from 03.08.2002, his possession of the suit property became that of an agreement holder in terms of Section 53(A) of Transfer of Property Act. Even prior to the agreement of sale, the 1st defendant had also received some amount and after the agreement of sale (i.e.,) after 03.08.2002 also, the 1st defendant had received certain amount, but all the amounts were made by the plaintiff to the defendant through bank cheques.

17. The plaintiff's peaceful possession and enjoyment of the suit property as the tenant was confirmed by the fact when the 1st defendant had taken out a rent control proceedings against the plaintiff in R.C.O.P.No.1522 of 2008 on the file of the XIV Small Causes Court, Chennai to evict him from the suit property. However, it was dismissed for default on 03.03.2010. The plaintiff has therefore, contended that pursuant to the sale agreement dated 03.08.2002, his possession by way of part

performance of agreement of sale has been protected under Section 53(A) of Transfer of Property Act.

18. The plaintiff has also contended that he was always ready and willing to perform his part of the contract. Infact, after fulfilling the 1st defendant's conditions, the plaintiff had arranged for the registration of sale deed through the 1st defendant's lawyer. For which, he had spent a sum of Rs.60,000/- towards purchase of stamp papers and another amount of Rs.15,000/- towards registration expenses. The stamp papers were also purchased by the 1st defendant's lawyer. As per the case of the plaintiff, he had paid a sum of Rs.3,16,000/-, out of total sale consideration as advance on various dates through bank cheques. Even after his repeated demands, the defendant had shown his deaf ears and therefore, the suit came to be filed by the plaintiff for the relief of specific performance of contract of sale.

19. The 1st defendant has admitted that the plaintiff was a tenant under him but, he would say that his tenancy was in respect of a portion situated on the western side of the premises on the basis of monthly rent of Rs.500/- which was let out to him in the year 1982. At the same time, he has denied the allegation that the tenancy is on the basis of lease on payment of one time lease rental of Rs.50,000/-. He would further state that the tenancy was only for residential purpose on the basis of the monthly rent of Rs.500/- which has been periodically increased from 1982 and the present monthly rent is Rs.2,750/-.

20. The 1st defendant has specifically denied the payment of Rs.50,000/- which was said to have been made by the plaintiff and according to him there was no such agreement between him and the plaintiff.

21. It is also the case of the defendant that the plaintiff had not paid the monthly rent properly from the year 1998 and also after shifting his premises from Triplicane to Neelangarai and used to pay the monthly rent only in piecemeal, and that the plaintiff had to pay a sum of Rs.1,00,000/- as on June 2002 towards arrears of monthly rent. Then, at the request made by the defendant to pay the rental arrears along with future rent, the plaintiff had paid a sum of Rs.2,00,000/- in the month of August 2002. But, this amount was not paid by the plaintiff towards the sale advance. According to the 1st defendant, the plaintiff is still having rental arrears nearly about Rs.1,80,000/-. The 1st defendant has also admitted the receipt of lawyer's notice from the plaintiff dated 10.12.2007 and that he had issued a reply dated 27.12.2007.

22. During the pendency of the suit, the appellant herein / 2nd defendant had come forward with an application in I.A.No.1869

of 2012 to implead himself as the 2nd defendant as he had allegedly purchased the suit property on 31.08.2010. This petition was originally dismissed by the trial court on 13.02.2012. Challenging the said order, the 2nd defendant had preferred a civil revision in C.R.P.D.No.966 of 2012 before this Court. This Civil Revision Petition in C.R.P.D.No.966 of 2012 was allowed on 10.10.2012 and in pursuant to the order of this Court dated 10.10.2012, the 2nd defendant was impleaded in the suit as the 2nd defendant.

23. The 2nd defendant's case is that he is the absolute owner of the suit premises bearing Old No.26, New No.38, Mujabar Jang Bahadur Street, Triplicane, Chennai-600 005, as he had purchased the said property under a registered sale deed dated 31.08.2010 bearing document No.989 of 2010 from the 1st defendant. Ever since from the date of purchase he has possession and enjoyment of the suit property. He would further contend that he is the bonafide purchaser for valuable consideration and that the plaintiff, despite his undertaking dated 26.05.2011, on receipt of Rs.5,00,000/- from him, had been evading to vacate and hand over the possession. In pursuant to the undertaking dated 26.05.2011, given by the plaintiff he is estopped from prosecuting the suit.

24. Based on the pleadings of the parties to the suit, the learned Trial Judge had proceeded to formulate as nearly as six issues for the better adjudication of the suit.

25. The plaintiff had examined himself as PW1. During the course of his examination, Exs.A1 to A37 were marked. On the other hand, 2nd defendant had examined himself as DW1, and during the course of his examination three documents 'viz.,' Exs.B1 to B3 were marked.

26. It is significant to note here that the 1st defendant had not entered into witness box.

27. On appreciation of the evidences both oral and documentary, the learned Trial Judge had proceeded to allow the suit with costs declaring that the plaintiff is entitled for the relief of specific performance and directed the defendants 1 and 2 to receive the deposited amount and to execute the sale deed in his favour within three months, failing which, the plaintiff is entitled to get the sale deed executed through the process of Court. The trial judge has also observed that the plaintiff is also entitled for the possession of the suit property from the 2nd defendant.

28. The defendants had preferred an appeal in A.S.No.28 of 2014 on the file of the learned IV Additional Judge, City Civil Court, Chennai. This appeal was dismissed after confirming the

judgment and decree of the trial court. Having been aggrieved by the judgment and decree of the 1st appellate court dated 12.09.2014, the defendants stand before this Court with this second appeal.

29. Despite 37 documents were marked on the side of the plaintiff and three documents on the side of the defendants, Ex.A2 dated 03.08.2002 (receipt-cum-sale agreement), Ex.B1 - sale deed dated 31.08.2010, and Ex.B3 dated 26.05.2011 (vacant possession hand over document) alone take the centre stage.

30. As observed in the opening paragraphs, the trial court had elaborately analysed the evidences placed before it, during the course of trial and on considering the relevant facts and circumstances the trial court had concluded that the plaintiff had established his case and therefore, given finding that he is entitled to get the relief of specific performance of contract of sale. The finding given by the trial court has been endorsed by the First Appellate Court.

31. At the outset, this Court may say that the prime contestant of the suit 'viz.,' the 1st defendant Mr.M.Gunasekar remained idle without trying to substantiate his case.

32. No doubt, originally the suit in O.S.No.629 of 2008, was filed on the file of City Civil Court, Chennai by the plaintiff on 22.01.2008 as against the 1st defendant (2nd appellant herein) Mr.M.Gunasekar

33. After four years, the 2nd defendant (1st appellant herein) Mr.S.A.Zahir Hussain had come forward with an application in I.A.No.1869 of 2012 under Order 1 Rule 10(2) of C.P.C., to implead himself as the 2nd defendant in the suit. As observed in the fore going paragraphs, his application was dismissed by the trial court on 13.02.2012. However, it was allowed by this Court in pursuant to the order dated 10.10.2012 and made in the C.R.P.PD.No.966 of 2012.

34. Ex.A2 is captioned as Receipt for Rs.2,00,000/- (Sale Advance). The contents of Ex.A2 are extracted as under:-

VENDOR:- Sri. M.GUNASEKAR S/o.Masila Mani Naicker
22, CHAKKRAPANI St., Ext. Ms.33.

PURCHASER:- T.SOMASUNDARAM S/o.V.Thava Mani Nadar
26, Mujaber JANG BAHADUR STREET,
ZAMBAZZAR, CHENNAI-600 005.

PROPERTY:- LAND AND BUILDING Situated at
No.(1/2 SHARE IN FRONT) No.26, MUJABAR
JANG BAHADUR STREET, CHENNAI-600 005.
Approximately - 800 Sq.ft.

SALE CONSIDERATION:- Rs.9,00,000/- (Nine Lakhs Only)

ADVANCE AMOUNT:- Rs.2,00,000/- (Two Lakhs Only)

Date : 03/8/02

Place: Chennai

Signed by the vendor M.Gunasekar
on the affixed Revenue Stamp

Agreed by the purchaser T.Somasundaram

35. The first substantial question of law which is formulated by this Court is :

i) Whether the courts below are right in holding that as per Exhibit A-2 the Respondent is entitled to get the relief of Specific performance when the Respondent has not complied with the requirement of Section 2(b) and (e) of the Indian Contract Act, 1872 ?

36. Clauses (b) and (e) of Section 2 (interpretation clause) of the Indian Contract Act, 1872 are extracted as under:-

2. Interpretation-clause.-

In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-

''(b) When the person to whom the proposal is made signifies his ascent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;''

37. It may be relevant to note here that there is no specific or standard format to constitute an agreement of contract. As it is envisaged under clause(b), the proposal to whom it is made is said to be accepted when it signifies his ascent. When the proposal is accepted, it becomes promise.

38. This promise is an agreement where it forming the consideration for each other as contemplated under clause(e).

39. Clause-(h) of Section 2 envisages that An agreement enforceable by law is a contract; and as per clause-(g) An agreement not enforceable by law is said to be void;

40. Where the letters between the parties are not precise in terms as to offer or acceptance and if one party, however, asserts that there was offer and acceptance, the Court must find out whether the acceptance was absolute in terms of the offer made. Unless such terms are reasonably ascertained, the Court will not enforce the terms of the contract. This ratio has been laid down by Karnataka High Court in Sudha vs. Shardamma (1986 (1) Civ.LJ.377) at 382, (Kant).

41. As observed in the earlier paragraphs, there is no standard format to reduce the terms of the contract.

A contract is completed when an offer made is accepted; it is the acceptance that gives rise to the cause of action; and not merely the making of an offer:

This principle is laid down by the Karnataka High Court in Republic Medico surgical Co. v. Union of India (AIR 1980 Karn.168).

42. As observed by the Apex Court in Sonia Bhatia v. State of U.P. AIR 1981 SC 1274, the term 'consideration' means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee; when the word 'consideration' is qualified by the word 'adequate', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and necessities of the case:

43. Here, in this case, this Court finds that Ex.A2 possesses with all the qualities to form a contract which is enforceable under law.

44. On a careful perusal of Ex.A2, this Court is taking the risk of repetition to say that Ex.A2 is captioned as receipt for Rs.2,00,000/- (sale agreement). Then again beneath the above said words it is stated as 'towards part payment of sale consideration' on account of land and building (old). This receipt cum sale agreement reveals that both the vendor as well as the purchaser 'viz.,' the 1st defendant M.Gunasekar and the plaintiff Mr.T.Somasundaram have put their signature. The total sale consideration as per Ex.A2 is Rs.9,00,000/-. A sum of Rs.2,00,000/- seems to have been paid as advance towards part payment of sale consideration. It is found that the 1st defendant M.Gunasekar had signed over one Rupee revenue stamp, and below his signature, the plaintiff had also signed.

45. In fact, the 1st defendant M.Gunasekar did not enter into the witness box. He has also not specifically denied the averments of the plaint in his written statement. Simply in his written statement, which is filed in the suit, he has stated in paragraph No.10 (last two lines): my client hereby specifically

denies the allegation that the plaintiff paid a sum of Rs.2,00,000/- towards sale advance.

46. It is the case of the plaintiff that he came into occupation of the suit property as lessee in the year 1982, on payment of one time lease rental of Rs.50,0000/- and secondly, he would contend that in the month of April 2001, the 1st defendant had approached him with a request for Rs.30,000/- to pay the property tax. He would further contend that in the year 2002, the 1st defendant had approached him with an offer to sell the suit property to him for a total sale consideration of Rs.9,00,000/- which was accepted by him and accordingly on 03.08.2002 a sum of Rs.2,00,000/- was paid towards sale advance by the plaintiff and the balance of sale consideration was agreed to be paid as and when the defendant executes the sale deed in favour of the plaintiff.

47. Rule 2 to Order 8 contemplates that :
New facts must be specially pleaded.-

'The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.'

48. Rule 3 of Order 8 is related to denial to be specific.-
It reads that:

'It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.'

49. Rule 4 of Order 8 enacts that :

'Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is he alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.'

50. As per Rule 5 of Order 8 Specific denial.-

''[(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:''

51. On coming to the instant case on hand, admittedly, the 2nd defendant in the suit is not a party to the contract of sale (i.e.,) he is not a party to Ex.A2. Therefore, he is not having competency to speak about the genesis of Ex.A2 because he came to be impleaded in the suit in the halfway.

52. As observed by Supreme Court in M.C.Chacko vs. State of Trivancore 1969 (2) SC WR 241, it is settled law that a person not a party to a contract, cannot, subject to certain well recognised exceptions, enforce the term of the contract. The recognised exceptions are the beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant. But, except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract.

53. The 1st defendant M.Gunasekar is the prime contestant against whom the suit was originally filed. He has filed his written statement simply placing his contention that the plaintiff was only a tenant and not a purchaser and that Ex.A2, the receipt cum sale agreement did not constitute as a sale agreement. The advance amount of Rs.2,00,000/- was paid as rental arrears. Thereafter, during the course of trial, he disappeared and did not participate in the trial proceedings by subjecting himself to be examined as a witness. He had been screening himself by projecting the 2nd defendant who is the 1st appellant herein as if he is the real contestant of the suit.

54. The 1st defendant has admitted the possession of the plaintiff in respect of the suit property. The learned Trial Judge in paragraph No.7 of his judgment had concluded that in Ex.A2, it is clearly recited that the plaintiff had paid a sum of Rs.2,00,000/- only as an advance towards the sale consideration and that there was no contra evidence to prove that the document under Ex.A2 is merely a receipt for payment of Rs.2,00,000/- towards the arrears of rent. He has further concluded that the receipt in Ex.A2 clearly reveals that the 1st defendant had agreed to sell the suit property in favour of the plaintiff for a sale consideration of Rs.9,00,000/- and that the 1st defendant had also received a sum of Rs.2,00,000/- as an advance and therefore, it is decided that Ex.A2 is the sale agreement and it is not the receipt for payment of rental arrears.

55. It is significant to note here that in order to disprove the genuineness of Ex.A2, the 1st defendant had not produced any evidence both oral or documentary. As observed by the learned Trial Judge since there is no contra evidence on the part of the 1st defendant, there is no other go, for the trial Court excepting to conclude that Ex.A2 was only a sale agreement.

56. Secondly, the learned Trial Judge in paragraph No.8 of his judgment had observed that the plaintiff had paid a sum of Rs.50,000/- through a cheque dated 07.08.2002 under Ex.A3 and he had further paid a sum of Rs.1,00,000/- towards balance of sale consideration through the cheque under Ex.A4 and besides this, he had also paid another sum of Rs.25,000/- by way of demand draft which was marked as Ex.A5. He has also observed that the evidence of PW1 would go to substantiate the fact unerringly that the above said payments were made towards the balance of sale consideration being the part performance of contract of sale and therefore, he had concluded that the plaintiff had paid a sum of Rs.1,75,000/- through Exs.A3 to A5 towards balance of sale consideration. The findings of the learned Trial Judge was endorsed by the I Appellate Court.

57. In his judgment, the First Appellate Court Judge has observed that:

"It is found from Ex.A2 that the 2nd appellant had agreed to sell the suit property for the total sale consideration of Rs.9,00,000/- and received Rs.2,00,000/- as advance amount."

58. PW1 in his evidence has stated that he had paid further payments towards part performance of contract for specific performance. It is found from Ex.A3 and A4 that a sum of Rs.50,000/- and Rs.1,00,000/- respectively were paid to the 1st defendant by way of cheques and it is also found from Ex.A5 demand draft that the plaintiff had paid a sum of Rs.25,000/- to the 1st defendant and therefore, the plaintiff through Exs.A3 to A5 had proved that those amounts were made only towards the balance of sale consideration by way of part performance of contract of sale which was not effectively denied by the 1st defendant as he had not chosen to examine himself to disprove the claim of the plaintiff. The Courts below had therefore rightly decided that the respondent had totally paid a sum of Rs.3,75,000/-.

59. Keeping in view of the above fact, this Court is also of the view that Ex.A2 has the potentiality to satisfy the requirements of the provisions of Section 2(b), (e) and (h) of the Indian Contract Act 1872 and therefore, this Court does not have any hesitation to endorse the concurrent findings of the courts below to say that the courts below are right in holding that as per Ex.A2, the plaintiff is entitled to get the relief of specific performance.

60. The second substantial question of law is:

Whether the Courts below are right in holding that the veracity of Exhibit B-3 to be proved by the 1st Appellant when the Respondent disputed his signature in Exhibit B-3 ?

61. The contentions of the 2nd defendant (appellant herein) is that he is not aware of the alleged agreement between the plaintiff and the 1st defendant and that he is the bonafide purchaser of the suit property for a valuable consideration. It is also his further contention that he came to know about the alleged agreement only subsequent to the sale deed bearing Doc.No.989 of 2010 dated 31.08.2010 (Ex.B1).

62. With reference to the second substantial question of law, the 2nd defendant would contend that the plaintiff had given an undertaking on 26.05.2011, and thereby he had undertaken that he would surrender the vacant possession of the suit property to him (D2) for which, he had received a sum of Rs.5,00,000/-. As per the undertaking, the plaintiff had to surrender vacant possession of the suit property within 30 days from 26.05.2011. Ex.B3 (vacant possession surrender deed) was produced and marked on the side of the 2nd defendant. In this connection he would contend that the plaintiff is estopped from prosecuting the suit. Further in pursuance of his undertaking dated 26.05.2011 this Unregistered document (Ex.B3) seems to have been attested by a Notary Public and two other persons had signed as witnesses. At the first instance, insofar as Ex.B3 is concerned, this Court would like to say that it has not been proved in the manner known to law. The 2nd defendant (1st appellant herein) alone had given evidence. In this connection none of the witness was examined to substantiate his case.

63. Mr.P.L.Narayanan, learned counsel for the plaintiff (respondent herein) has adverted to that the 1st defendant had set up the 2nd defendant (appellant) and created the alleged encumbrance over the suit property with an intention to obstruct the above suit. He has continued that the 2nd defendant had brought the above forged document (Ex.B3) which had also not been proved in accordance with law. Since the defendants had no case on merits they had resorted to bring about the forged document on record 'viz., ' Ex.B3.

64. With reference to Ex.B3, the alleged undertaking given by the plaintiff Mr.P.L.Narayanan has contended that the onus of proof was on the 2nd defendant to show that Ex.B3 was executed by the plaintiff. He has also maintained that the signature of the plaintiff found placed in Ex.B3 was forged by the 2nd defendant in order to support his case and that it is for him to prove the document as he had been heavily banking on this document (Ex.B3)

he has also added that since the plaintiff had not raised such plea it is not for him to prove the negative i.e., he did not execute the alleged document Ex.B3. In order to support his contention he has placed reliance upon the decision in Tiruvengadam Pillai vs. Navaneethammal and another in 2008 (4) SCC 530.

65. Obviously Ex.B3, the alleged undertaking letter dated 26.05.2011 was not confronted with PW1 during the course of his examination. No question with reference to Ex.B3 was also up to the plaintiff while he was subjected to cross-examination. Since the 2nd defendant(appellant) has vehemently contested that the plaintiff had execute the letter of undertakings on 26.05.2011 to surrender the vacant possession of the suit property to the 2nd defendant. It is for the 2nd defendant to establish the fact as stated in the fore going paragraphs out of two witnesses none of them was examined by the 2nd defendant. In the cross examination he had stated that the witnesses were his friends and to substantiate his contention the witnesses who are said to have signed in Ex.B3 were not examined. Another question in respect of Ex.B3 is also arisen to the effect that when the plaintiff had paid Rs.9,00,000/- and odd to the plaintiff towards entire sale consideration how he could have received a sum of Rs.5,00,000/- from the 2nd defendant to surrender the vacant possession. The 2nd defendant had also admitted in his evidence that with regard to the fabrication of Ex.B3, the plaintiff had lodged a police complaint as against him.

66. With regard to Ex.B3 both the courts below have concurrently found that Ex.B3 alleged letter of undertaking dated 26.05.2011 is not genuine and it was concocted one.

67. The substantial question of law No.3 is extracted as under:

'3. Whether the Courts below are right in decreeing the suit and directing the Appellants to deliver the vacant possession of the suit schedule property to the Respondent in the absence of a suit prayer by the Respondent seeking for possession of the suit schedule property in terms of Sections 5 and 6 of Specific Relief Act ?'

68. Part II of Specific Relief Act, 1963 deals with specific relief. Chapter I encompasses Sections 5 to 8 under the caption of recovering possession of property.

'Section 5 enacts as under:

5. Recovery of specific immovable property._ A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908.'

Section 6 is extracted as under:-

'6.Suit by person dispossessed of immovable property._ (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought-

(a) after the expiry of six months from the date of dispossession; or

(b) against the Government.

(3) No appeal shall be lie from any order or decree passed in any suit instituted under this section, nor shall, any review of any such order or decree, be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.'

69. Admittedly, the plaint does not contain with a prayer seeking possession of the suit schedule property. However, it has to be remembered that in the prayer (a) portion, the respondent has sought the relief of a direction as against the defendants to execute and register a sale deed in favour of the respondent/plaintiff in respect of the property situate at No.26, New No.38, No.26, (New No.38), Mujabar Jang Bahadur Street, Triplicane, Chennai-600 005, measuring about 800 sq.ft., (front portion in the western side) morefully described in the schedule herein, for a total sale consideration of Rs.9,00,000/- within a date which may be fixed by the Court failing which the Court may execute and register such sale deed in favour of the respondent/plaintiff on behalf of the defendant.

70. The prayer portion (b) and (c) of the plaint are related to permanent injunction.

71. The trial court based on the materials had formulated the third issue ''as to whether the plaintiff is entitled to get the relief for specific performance ?''

72. Including the third issue, all the six issues were answered in favour of the respondent/plaintiff. In the operative portion of the Judgment, the trial court has stated as under:-

'In the result, the suit is decreed with cost declaring that the plaintiff is entitled for the relief of specific performance and the defendants 1 and 2 are directed to receive the deposited amount and to execute the sale deed in favour of the plaintiff within three months, failing which the plaintiff is entitled to get the sale deed through the process of Court. The plaintiff is also entitled for the possession of the suit property from the 2nd defendant.'

73. This Court would like to emphasize the underlined portion (i.e.,) 'the plaintiff is also entitled for the possession of the suit property from the 2nd defendant'.

74. Section 22 of the Specific Relief Act contemplates power to grant the relief of possession, partition, refund of earnest money etc., Sub-Section(1) to Section 22 reads as under:

"22. Power to grant relief for possession, partition, refund of earnest money, etc.— (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) Possession, or partition and separate possession, of the property, in addition to such performance; or
(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or [made by] him, in case his claim for specific performance is refused."

Sub-Section (2) reads as under:-

(2) No relief under clause (a) or clause (b) of sub-section(1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint of such terms as may be just for including a claim for such relief.

75. Similar to the present case on hand, in Sunderlal and Ors Vs. Gopal Sharan reported in 2003 (3) AIC 964 (M.P) in Gwalior Bench of Madhya Pradesh High Court, in a suit for specific performance, relief of possession was not asked. Plaintiff-respondent had pleaded himself in possession. Decree of specific performance was passed but it was silent about possession. There was no finding on possession, In execution of decree the plaintiff had also claimed possession. Under this circumstance it was held that the relief of possession could be given by the executing court as the decree of specific performance of contract itself is implied in the decree for possession.

76. It may also be relevant to note here that Section 22 of the Specific Relief Act, 1963, enacts a rule of pleading. This section was introduced to avoid multiplicity of proceedings and therefore, the plaintiff could also claim a decree for possession in a suit for specific performance, even though, the right to possession accrued only after the suit for specific performance was decreed. This principle is laid down in Jafar

Mian v. Smt. Qaisar Jahan Begum And Others reported in 2006 (65) All LR 373.

77. In a similar case (i.e.,) in C.R.P.NPD.Nos.3974 and 3975 of 2013 which was decided by this Court on 17.11.2016, in a suit for specific performance, no relief for delivery of possession was sought for in the original suit. At the time of filing the execution petition in E.P.No.23 of 2013 for delivery of property, a question was arisen as to

Where a suit for specific performance of contract of sale has been decreed, can the executing Court while executing the decree direct delivery of possession in the absence of specific direction to that effect in the decree ?

78. This question was answered affirmatively by the executing Court after placing reliance upon the decisions of this Court in S.S.Rajabathar Vs. N.A.Sayeed reported in AIR 1974 Madras 289 (V.61, C.87) and Duraisamy and Others Vs. V.P.Periyasamy Gounder and Others reported in 2012-4-L.W.729. The executing Court has also found that delivery of possession can be claimed after adding the relief of possession as contemplated under Section 22 of the Specific Relief Act and that the plaint as well as the decree could be suitably amended so as to enable the decree holder for taking delivery of possession of the property.

79. In the above referred case (C.R.P.NPD.Nos.3974 and 3975 of 2013), this Court has held that in the absence of a specific prayer in the suit for specific performance of contract, at the time of execution proceedings also, the relief of delivery of possession can be maintained as per Section 22 of the Specific Relief Act, as the relief of delivery of possession is implied in the decree passed in the suit for specific performance of contract of sale.

80. Keeping in view of the above facts, this Court finds that the courts below are absolutely right in decreeing the suit and directing the appellants to deliver vacant possession of the suit schedule property to the respondent in the absence of a suit prayer by the respondent/plaintiff seeking for possession of the suit schedule property.

81. Again this Court is taking the risk of repetition that already the 1st defendant had admitted the possession of the plaintiff in respect of the suit property. The plaintiff claims that he had been in possession of the property right from the year 1982 as a tenant. According to him, from 3/8/2002 on which date Ex.A2 receipt cum sale agreement was executed. He had been in possession of the suit property in the capacity of agreement holder in terms of Section 53(A) of the Transfer of Property Act.

82. It is revealed from records that during the pendency of the suit the plaintiff had filed an application in I.A.No.4300 of 2010 seeking leave of the Court to deposit the balance sale consideration of Rs.5,40,000/-. This petition was allowed on 11.11.2010 against which, the 1st defendant had preferred a Civil Miscellaneous Appeal in C.M.A.No.24 of 2011 before the I Additional City Civil Court, Chennai. That C.M.A. Was dismissed on 15.11.2011 confirming the order of the trial court. Admittedly, no appeal was preferred by the 1st defendant. Therefore, the order dated 15.11.2011 had become final. In pursuant to the above said order, the plaintiff had also deposited the entire balance of Rs.5,40,000/- on 26.11.2010 to the credit of the above suit. A receipt was also issued by the Court on 26.11.2010 bearing No.179. Therefore, according to the plaintiff he had paid the entire sale consideration.

83. The 2nd defendant/appellant got himself impleaded in the suit in pursuant to the order of this Court(HIGH Court) dated 10.10.2012. Thereafter, the plaint was suitably amended impleading the 2nd defendant/appellant as the 2nd defendant in the suit and subsequently he had also filed his written statement on 06.11.2012.

84. On 11.09.2011, at about 10 p.m., the 1st defendant along with the 2nd defendant(1st appellant) had trespassed into the suit property which was protested by him. It is also his case that on 31.10.2011, both had again trespassed into the suit property and demolished the old existing building after removing the plaintiffs articles stored in the said building and may attempt to put up unauthorised construction. It is also the case of the respondent/plaintiff that he had immediately filed an application in I.A.No.19269 of 2011 in the above suit seeking direction from the trial court to direct the 1st defendant to put-back the plaintiff in the possession of the suit property. The plaintiff had also filed another application in I.A.No.19270 of 2011 seeking an order of interim injunction against the 1st defendant directly or indirectly from meddling with the suit property from putting up any further construction thereon in any manner dealing with the suit property, pending disposal of the above suit. Both the above said petitions were allowed in a common order dated 11.01.2012.

85. In this connection, Mr.P.L.Narayanan, learned counsel for the plaintiff had contended that in order to obstruct the earlier disposal of the suit, the 1st defendant had set up the 2nd defendant and made him to file an application in I.A.No.1869 of 2012 in the above suit to implead him as the 2nd defendant as he had allegedly purchased the suit property on 31.08.2010. This petition was dismissed by the trial court against which, the 2nd defendant had filed a revision in CRP PD.No.966 of 2012 before

this Court which was allowed on 10.10.2012 and in pursuant to the above said order, the 2nd defendant/1st appellant got himself impleaded in the suit.

86. With reference to this point the learned Senior Counsel Mrs.Nalini Chidambaram has argued that even according to the case of the plaintiff, the plaintiff was dis-possessed of on 31.10.2011 and the 1st defendant along with the 2nd defendant had demolish the old existing building after removing the plaintiffs article from the suit property which were stored there and that is they may admit to put up unauthorised construction. According to the learned Senior Counsel Mrs.Nalini Chidambaram, on and from 31.10.2011, the plaintiff was not in possession of the suit property as he was dis-possessed of the suit property.

87. As argued by Mr.P.L.Narayanan, the plaintiff had filed two applications, (i) I.A.No.19269 of 2011 seeking a direction to direct the 1st defendant to put him back in the possession of the suit property.

(ii) I.A.No.19270 of 2011 seeking an order of interim injunction against this 1st defendant directly or in directly from meddling with the suit property from put up further construction thereon or in any manner dealing with the suit property pending disposal of the suit.

88. Both the petitions were allowed by the trial court in a common order dated 11.01.2012. In this regard, Mrs.Nalini Chidambaram, learned Senior Counsel has raised the following crucial question.

'When the plaintiff was not in possession of the property on and from 31.10.2011, how the trial court could grant an order of interim injunction against the 1st defendant restraining him from putting up any further construction, or in any manner dealing with the suit property ?'

89. She has continued further that the prohibitory order passed by the trial court on 11.01.2012 in the above said application was totally unsustainable either on law or facts as the plaintiff was no at all was in possession of the suit property. Further, she has adverted to that the courts below were wrong in decreeing the suit and directing the defendants to deliver vacant possession of the suit schedule property to the plaintiff in the absence of a prayer seeking for possession of the suit schedule property in terms of Sections 5 and 6 of the Specific Relief Act. In support of her contention she has placed reliance upon the following two decisions:

- 1) Anil Rishi vs. Gurbak Singh reported in 2006(5) SCC 558
- 2) Muthu Krishna Naidu and others vs. T.M.Tamodharan choudry and others decided on 18.10.1976 by this Court reported in 1978 (1) MLJ 351.

90. In Anil Rishi's case, an agreement of sale dated 26.03.1991 was entered into by and between the parties hereto in relation to the premises bearing house No.86, situate in Sector 18A Chandigarh a sale deed was executed pursuant to the said agreement to sell on 26.03.1991. However, a suit for declaration was filed by the respondent therein alleging that the said sale deed dated 26.03.1991 was forged, fabricated and was a void document. This suit was contested by the appellant therein denying the allegations contained therein. In the above said sale deed, an issue was formulated by the trial court as to whether the sale deed dated 26.03.1991 was forged and fabricated. Another question was also formulated to the effect that whether the alleged sale deed dated 26.03.1991 was valid and genuine. The trial court has held that 'Normally the initial burden of proving the execution of a document when it is denied must rest upon the person alleging its execution. In the present case the plaintiff has denied the execution of the sale deed. The onus to prove an issue as to be discharged in the affirmative. 'It is always difficult to prove the same in the negative'. When the fact is proved affirmative or evidence is led to prove the same, onus shifts on the other side to negate the existence of such a fact.'

91. A revision application filed on behalf of the appellant herein against the said order which was dismissed by the High Court against which, the above said appeal was preferred by the Apex Court. While penning down the judgment on behalf of the Apex Court, Hon'ble Mr. Justice S.B. Sinha has observed in paragraph No.19 as under:

'There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.'

92. In Muthu Krishna Naidu and others cited 2nd supra, a learned Judge of this Court (V.Ramasamy J.,) in paragraph No.3 has observed as under:-

'13. In the second appeal, learned Counsel for the appellants contended that since it is admitted by the respondents that subsequent to the filing of the suit, the defendants have got possession of the property, there is no case for granting an injunction and the lower appellate Court erred in thinking that it could not take into account the subsequent events which have a bearing on the question of injunction. The learned Counsel, in my opinion, is well-founded in this contention. The suit is for an injunction restraining the defendants from interfering with the plaintiffs' possession and enjoyment of the plaint schedule properties as long as they are the lessees and cultivating tenants in respect thereof. In such circumstances, when the properties are not in the possession of the plaintiffs on the date when the decree was passed, I am unable to understand how this decree for injunction could be of any use or operation. Merely because a decree for injunction is granted, the plaintiffs will not be entitled to recover possession of the properties as the suit itself was not decreed for possession. If the plaintiffs had asked for an amendment of the plaint and prayed for possession and injunction on the finding that the plaintiffs are the tenants, they could have got possession and injunction. But I find that in the trial Court itself, though a petition for amendment was filed by them they did not pursue the same when it was returned to them and did not represent the same. Subsequent to the filing of the suit, the plaintiffs had been dispossessed and the properties are in the hands of the defendants and the injunction was refused. Though the plaintiffs filed an appeal, they did not choose to ask for possession. The lower appellate Court, as already stated, thought that even without possession an injunction could be granted and it is not necessary for him to take into account the subsequent events. Even if I were to sustain the decree of the lower appellate Court, what is the earthly use of that decree, I am unable to understand. It will not have the effect of decreeing the suit for possession. Injunction could be granted only if the plaintiffs are found to be in possession of the properties and when they are not in possession no injunction could be granted. It is the bounden duty of the lower appellate Court to have taken into account the

subsequent events that had happened prior to the decree. It is not to say that in every case the subsequent events will have to be taken into account. But in a matter of this kind where the decree is to operate not only as on the date of suit but even subsequently thereafter, possession is a relevant factor and the Court cannot ignore the fact that the plaintiffs have been dispossessed subsequent to the filing of the suit. No question of injunction, therefore, arises and the suit is liable to be dismissed.''

93. According to the learned Judge subsequent event should have been taken into account by the trial court and when the plaintiff in the above said case was not at all in possession of the property and he was dispossessed off, a decree for injunction ought not to have been granted as the suit itself was filed for bare injunction.

94. On the other hand, Mr.P.L.Narayanan has argued that after obtaining the order copy of the said common order dated 11.01.2012 and made in the application in I.A.No.19269 and 19270 of 2011, the plaintiff had asked the defendant to stop the construction work and vacate the suit property for which, the defendants had not responded. Hence, on 11.03.2012 he had lodged a complaint to restore his possession, but no action was taken by the 3rd defendant. Therefore, the plaintiff had filed a writ petition in W.P.No.981 of 2012 before this Court to direct the Inspector of Police, D3 Police Station to register a case on his complaint. But, this writ petition was dismissed on 09.04.2012 with an observation to approach the civil court under Order 39 Rule (2)(A) of CPC. Therefore, Mr.P.L.Narayanan has contended that the plaintiff had filed an application in I.A.Nos.18151, 18158, 18159 and 18160 of 2012 before the trial court. Out of the above said applications I.A.No.18157 of 2012 was allowed under Order dated 05.06.2013 directing the 3rd respondent/Inspector of Police, D3 Police Station to put back the plaintiff in possession of the suit property by removing the defendants 1 and 2 from the suit property. Mr.P.L.Narayanan has also mentioned that the plaintiff had been in physical possession and enjoyment of the suit property to start with as a tenant and the same was confirmed by the fact that the 1st defendant had filed a petition in RCOP No.1522 of 2008 before the XIV Small Causes Court to evict the plaintiff from the suit property which was dismissed for default on 03.03.2010. While advancing his argument, Mr.P.L.Narayanan has also drawn the attention of this Court to the cross-examination of DW1 (appellant) wherein he had admitted that he came to the possession of the suit property after 13 days from the date of his sale deed dated 31.08.2010.

95. Mr.P.L.Narayanan has also contended that the sale deed under Ex.B1 dated 31.08.2010 in favour of the 2nd defendant (appellant) was a sham and nominal one and it had no value in the eye of law. He has also added that the defendants 1 and 2 have not evince any interest or steps to evict the plaintiff in accordance with due process of law. He has further contended that as there is no evidence to show that the defendants had obtained possession through legal means. The plaintiff had got every right to put back in possession of the suit property. He has also added that even in an interim application where the plaintiff had been un lawfully dispossessed and he may be put back in the possession in the absence of the interim injunction order in any suit even in bare injunction suit. In support of his contention he placed reliance upon the following decisions:-

- i) M/s.ITC Ltd., vs. M/s.New Kashmir Stores (1998 (2) LW 483).
- ii) Sh.Abdul Hakkim vs. AIR 1998 (Rajasthan) 157
- iii) Mrs.Thamayanthi Devi Ampikaipakan vs A.Tharmalingam 1997(3)LW 187

96. In M/s.ITC Ltd, vs. M/s.New Kashmir Stores in 1998-2-L.W. 483 cited first above, the Division Bench of this Court has held as under:

Held: In the instant case, admittedly the plaintiff is in possession of the premises for about 15 years. Whether he is a licensee or lessee is to be decided by the trial court after the evidence is let in by looking into the surrounding circumstances and the intention of the parties to decide about the relationship of the parties. Therefore, the defendant on the strength of the stray observation with reference to the right of the licensor made by the Apex Court, cannot take the law into its own hands by entering into the locked premises, in the name of exercise of re-entry, while the whole question is to be decided by the trial court only at the time of conclusion of the trial.

It is also been held that :

The learned Single Judge has held that even in the suit with the main prayer for permanent injunction, the interim order could be passed for restoration of possession, especially when the court finds that the plaintiff was unlawfully dispossessed and as such, it cannot be contended that the reliefs granted in the interlocutory applications, in view of the peculiar facts and circumstances of the case due to the fresh developments, would be beyond the scope of the suit. Therefore, we have no hesitation to hold that the learned single judge was right in granting the said reliefs, especially in the face of

the conduct of the defendant. One thing is clear that the plaintiff appeared to be in continuous possession of the premises even after the so called termination of the licence granted to him as early as in 1983, notwithstanding the nature of possession as to whether he is a lessee or licensee which is to be decided in the suit. ''Prima facie, the plaintiff was found in possession of the premises by the learned single Judge prior to the so called forceful entry into the premises by the defendant. Thus, we find that the plaintiff did make out a prima facie case before the learned single Judge with which we also agree.''

97. In Sh.Abdul Hakkim and another cited 2nd supra, the plaintiff was dis-possessed from shop in dispute pending suit.

98. In this connection Jaipur Bench of Rajasthan High Court has held that an Amendment in plaint for seeking relief, not necessary and that an Order directing the defendant to hand over possession to plaintiff to restore statusquo ante is proper.

99. In Mrs.Thamayanthi Devi Ampikaipakan vs A.Tharmalingam cited 3rd supra. R.Jayasimma babu, J, the judge of this Court as he then was has observed that :

''Order of injunction will bind not only the parties against whom the order is passed, but also their men, agents, servants or persons claiming through or under them and persons who have knowledge of the passing of the order. The learned judge has also held that it is not necessary to demolish the constructions made, in violation of the orders of injunction.''

100. In view of the above cited case :

''the application was filed on the original side of the High Court praying to punish the respondents for their wilful disobedience of the order of injunction passed by the Court(pending the Civil suit on its file) restraining the defendants, agents, servants or any person claiming through or under them, from proceeding with the construction of the multi-storeyed building. It was stated that RK. Proprietrix of the 4th defendant builder firm(p), had adopted an attitude of total defiance, ignored the communication from the 1st defendant, and ignored the contents of the affidavit which discloses the existence of injunction order, and that she chose to proceed with the construction, in violation of the injunction and after having completed the same, filed an affidavit in this Court stating that she

completed the construction in March, 1996 and thereafter, she had executed documents in favour of allottees. It was submitted for the applicant that the injunction having been violated., appropriate action that should only be taken, is to issue a direction to demolish the building so that status quo ante can be restored and that apart from Order 39, Rule 2A, this Court has ample powers under Section 151, C.P.C., to give such directions as are necessary in the interest of justice, to uphold the dignity of this Court and the need for ensuring compliance with the orders and directions made by this Court from time to time.''

101. With reference to assertion of proof Mr.P.L.Narayanan has argued that since the plaintiff had claimed that Ex.A2 was executed between him and the 1st defendant in respect of sale of the suit property in his favour and payment of Rs.2,00,000/- by him on 03.08.2002 on which date, Ex.A2 receipt cum sale agreement was stated to have been executed had been proved by him , but, on the other hand, the 1st defendant who is a party to the sale agreement under Ex.A2 has miserably failed to substantiate his case. Despite his filing of his written statement registering the suit claim, he has also added that the 2nd defendant who is the appellant herein had no locus-standi to challenging the existence Ex.A2 as he was not a party to the document. In this connection, he has made reliance upon the following decisions.

1. RAMNIVAS VYAS AND OTHERS vs. H.SRINIVASA BHATI AND OTHERS (2013) 15 SCC 198.
2. Smt.Kumari Devi and others vs. Noor Mohammad Mian and another (AIR 2002 Patna 132) = 2001(4)PLJR 624.

102. In RAMNIVAS VYAS AND OTHERS cited 1st supra, the Apex Court has held that party who asserts a fact must prove that fact. Plaintiff in a suit for specific performance who asserts that agreement of sale was executed in his favour by defendant has to prove this fact to substantiate his claim. Similarly, if plaintiff asserts that agreement of sale in favour of third party is ante-dated and fabricated to defeat his rights, plaintiff has to prove this fact. Plaintiff is also required to prove that above fact existed on date of ascertain made by him.

103. On coming to the instant case on hand, observed earlier, the plaintiff has substantiated his claim through both oral and documentary evidence but the 1st defendant has miserably failed to disprove the claim of the plaintiff. Secondly, the 2nd defendant who is the appellant herein has claimed that the plaintiff had given a letter of undertaking under Ex.B3 dated 26.05.2011 and thereby he had agreed to surrender the vacant possession of the suit property in his favour within 30 days

from 26.05.2011. It is also the case of the 2nd defendant that in order to surrender the vacant possession the plaintiff had received a sum of Rs.5,00,000/- from him. From the contention made by the 2nd defendant/plaintiff ought to have been proved by him but he had miserably failed to establish his contention. The courts below have also given concurrent finding saying that the 2nd defendant/appellant had not proved his contention with regard to the genesis of Ex.B3.

104. In Smt.Kumari Devi and others, the learned Judge of Patna High Court has held that the Onus to prove genuineness of sale deed laid heavily upon beneficiary of sale deed.

105. It is apparent that the plaintiff has not prayed for possession of the suit schedule property in the prayer portion (a) the plaintiff has sought the relief of direction against the defendants to execute and register a sale deed in his favour in respect of the suit property for a total sale consideration of Rs.9,00,000/- within a date fixed by the Court, failing which, execute and registering such sale deed in his favour on behalf of the defendants.

106. It is to be reiterated that Mrs.Nalini Chidambaram, learned Senior Counsel, while advancing her argument has placed reliance upon the decision in Muthu Krishna Naidu and others vs. T.M.Thamothara Chowdary and others (1978) 1 MLJ 351, to support her contention that the permanent injunction cannot be granted without amendment for the relief of possession.

107. As argued by Mr.P.L.Narayanan, this case is distinguishable under facts. Obviously this suit is filed for specific performance of agreement and permanent injunction. In the application in I.A.No.18157 of 2012, the trial court had ordered for repossession. Based on the above said order, the trial court had reiterated in the final judgment. In ITC Ltd., 1998(2) LW 483, a Division Bench of this Court has made it clear that without amendment for the relief of possession it could be granted when the plaintiff is unlawfully dispossessed. In another case in AIR 1998 Rajasthan 157 a learned Judge of Rajasthan High Court has held that amendment of plaint for seeking relief of possession is not necessary.

108. Keeping in view of the above fact, this Court finds that both the defendants including this appellant have failed to prove their respective cases. To the contrary, the plaintiff has established his case to the hilt. This Court is therefore of view that the concurrent findings of the courts below in directing the defendants 1 and 2 to receive the deposited amount and to execute the sale deed in favour of the plaintiffs within three months from the date of the judgment and decree of the suit does not suffer with any infirmity and therefore, the

interference of this Court to exercise its appellate jurisdiction does not require.

109. Before part with the judgment this Court finds that this is the high time to place it on record that the trial court while answering for the issues 4 and 5 had observed that there was no recital in Ex.A2 sale agreement regarding change of tenancy into possession as per the provisions of Section 53(A) of Transfer of Property Act. The trial court has also observed that Ex.A2 sale agreement was executed after the commencement of Registration Act and since Ex.A2 is an un registered document, as per the amended Act the plaintiff is not entitled to claim possession under Section 53(A) of the Transfer of Property Act.

110. This observation made by the learned Trial Judge is absolutely wrong and not sustainable under law. For the simple reason that Ex.A2 receipt cum sale agreement is dated back to 03.08.2002. The documents which are required to be registered are enumerated under clauses (a) to (f) of sub-section (1) of Section 17 of the Registration Act, 1908.

111. Insofar as clause (f) is concerned, it has been added after clause(e) in sub-section(1) of Section 17 in view of the Tamil Nadu Act No.38 of 1987 by Section 3.

Section 17(1A) reads as under:-

[1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of Sec.53A of the Transfer of Property Act, 1882(4 of 1882), shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001, and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said Section 53A.]

112. It is pertinent to note here that Section (1A) of Section 17 has been inserted by the Registration and Other Related laws (Amendment) Act, 2001 (48 of 2001) Section 3(b) vide the Gazette of India Extraordinary, Part II, Sec.1 dated 24th September, 2001.

113. Thus, it is made clear that Sub-Section 1A of Section 17 has been inserted as per the above amendment made under Registration and Other Related laws(Amendment) Act 2001 by Section 3(b) vide the Gazette of India Extraordinary, Part II, Sec.1 dated 24th September, 2001. Therefore, this Court would like to make it clear that Sub-Section 1A of Section 17 has been inserted as per the above amendment which is publicised in Gazette of India Extraordinary. It is not the amendment made by the Tamil Nadu Government. As per Section 17 (1A) if any

contract is made to transfer the immovable property for the purpose of Section 53-A of the Transfer of Property Act, 1882 it shall have to be registered provided they are executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said Section 53-A.

114. Section 53-A of the Transfer of Property Act is extracted as under:-

53 A. Part performance

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that "the contract, though required to be registered, has not been registered, or," where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]

115. It is significant to note here that the Tamil Nadu Government under Act 29 of 2012 has made the following amendment to clause (f) of sub-section (1) of Section 17 as under:-

[(f) instruments of agreement relating to construction of building as referred to in clause(i) under Article 5 of Schedule I to the Indian Stamp Act, 1899 (Central Act II of 1899);

(g) instruments of agreement relating to sale of immovable property of the value of one hundred rupee and upwards;

(h) instruments of Power of Attorney relating to immovable property other than those executed outside India;

(i) instruments evidencing an agreement relating to the deposit of title deeds:]

As per the Tamil Nadu (Amendment) Act 29 of 2012 clause(f) to sub-section(1) of section 17 was substituted as clauses (f), (g), (h) and (i) w.e.f.1-12-2012.

116. In view of the Tamil Nadu Act 29 of 2012 which came into effect from 01-12-2012, clause (g) reads as under:

(g) instruments of agreement relating to sale of immovable property of the value of one hundred rupee and upwards;

117. On coming to the present case on hand, Ex.A2 receipt cum sale agreement was executed on 03.08.2002. It is obvious to note here that the Tamil Nadu Act 29 of 2012, which came into effect from 1.12.2012 does not have retrospective effect, instead it is having only prospective effect. Since Ex.A2 was executed in the year 2002 (i.e.,) on 03.08.2002, clause (g) of sub-section (1) to Section 17 is not made applicable. Equally, section 17(1A) is also not made applicable and therefore, the non-registration of the documents under Ex.A2 would not in any way affect the case of the plaintiff.

118. Keeping in view of the above fact, the observation made by the learned Trial Judge in paragraph No.12 while answering for the issues 4 and 5 that Ex.A2 sale agreement was executed after the amendment of Registration Act and that Ex.A2 sale agreement is an unregistered document as per the amended Act, the plaintiff is not entitled to claim protection under Section 53-A of the Transfer of Property Act by virtue of unregistered sale agreement is not sustainable and therefore, this particular observation is required to be expunged or removed.

119. The 2nd defendant / 1st appellant has repeatedly claimed in his written statement that he is the absolute owner of the suit property and that the plaintiff himself is aware of the fact that he had bonafidely purchased the suit property from the 1st defendant for due consideration and that he has been in possession and enjoyment of the suit property.

120. As observed in the body of the judgment, the 2nd defendant/1st appellant is not a party to Ex.A2 contract of sale. The suit was filed by the plaintiff in the month of January 2008 as against the 1st defendant alone. In view of the order of this Court dated 10.10.2012 and made in C.R.P.PD.No.966 of 2012, he got himself impleaded in the suit as the 2nd defendant on 28.11.2012. After four years, from the date of filing of the suit, the 2nd defendant has claimed that as per Ex.B1 sale deed

dated 31.08.2010 he had purchased the suit property from the 1st defendant and only thereafter, he had come to know about the existence of Ex.A2. He would further contend that in pursuant to his purchase of the suit property under Ex.B1, Ex.A2 had become invalid as he is bona-fide purchaser for valuable consideration. Admittedly, the 2nd defendant had purchased the document under Ex.B1 during the pendency of the suit. Therefore, he is bound by the provisions of Section 52 of the Transfer of Property Act. As he had purchased the property with full knowledge of pendency of the suit proceedings between the plaintiff and the 1st defendant. As the sale deed dated 31.08.2010 Ex.B1 containing the recital that the 1st defendant had delivered only symbolic possession of the suit property. As rightly argued by Mr.P.L.Narayanan, the genuine sale deed for valuable consideration will not have such recital and further it has to be noted that there is also a recital in Ex.B1 dated 31.08.2010 that the 1st defendant should co-operate with the 2nd defendant in sorting out the legal issues.

121. Keeping in view of the above fact, this Court finds that even assuming that the sale in favour of the 2nd defendant is genuine still it is hit by Section 52 of the Transfer of Property Act.

122. The 4th substantial question of law is :
Whether the suit is barred by limitation ?

123. According to Mr.P.L.Narayanan, the suit is filed within the prescribed period of three years as per Article 54 of the Limitation Act as the period of limitation starts from the date of refusal of parties. Insofar as this suit is concerned, the refusal comes from the reply notice dated 27.12.2007(Ex.A15). The suit appears to have been filed in the month of January 2008.

124. Further, from the date of sale agreement (i.e.,) from 03.08.2002, only by September 2007, the 1st defendant had been receiving payments towards the sale consideration and there were continuous discussions between the plaintiff and the 1st defendant and several acts had been done by the plaintiff towards the execution of sale deed by relying on and trusting the 1st defendant's assurances.

125. It is also to be noted that the 2nd defendant has not raised the plea of limitation in his written statement. Moreover, no reference is also available to show that the defendants 1 and 2 had argued before the trial court on the issue of limitation.

126. Keeping in view of the above fact, this Court finds that the suit filed by the plaintiff is well within the period

of limitation as per Article 54 of the Limitation Act, 1963.

'In view of the settled proposition of law that the concurrent findings of the Courts below based on appreciation and in consonance with the evidence, even if the same are erroneous till some extent, the same being finding of fact, could not be interfered under Section 100 of the CPC. Such principle is laid down by the Apex Court in the matter of Kondiba Dagadu Kadam v. Savithribai Sopal Gujar, AIR 1999 SC 2213, Rajaram M. Caisukar v. St. Joseph Chapel Ansabhat, 2013(1) Civ LJ 370 (Bom)''

127. On considering the submissions made on behalf of both sides and on the basis of the observation made above, all the four substantial questions of law are answered as against the defendant and in favour of the plaintiff.

128. In the result, the Second Appeal is dismissed with costs through out and the judgment and decree of the courts below are confirmed. Consequently, connected miscellaneous petition if any is closed.

Sd/-
Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

To

1. IV Additional Judge,
City Civil Court,
Chennai

2. VI Assistant Judge,
City Civil Court,
Chennai.

+1 cc to M/s.P.C.Narayanan, advocate, sr.71548

+1 cc to M/s.C.Uma, advocate, sr.71324.

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